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No. 87-482

In The

Supreme Court of the United States

October Term, 1987

EASTER SEAL SOCIETY FOR CRIPPLED CHILDREN AND ADULTS OF LOUISIANA, INC.,

Petitioners,

vs.

PLAYBOY ENTERPRISES, INC., *et al.*,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES F. THENSTED
SKYE MCLEOD
BARHAM & CHURCHILL
400 Lafayette Street, Suite 300
New Orleans, Louisiana 70130
Telephone: (504) 523-3565
Attorneys for Defendants-Respondents Greater New Orleans Educational Television Foundation

A.R. CHRISTOVICH, JR.
LIANE C. KING
CHRISTOVICH & KEARNEY
Pan American Life Center
601 Poydras Street, Suite 2300
New Orleans, Louisiana 70130
Telephone: (504) 561-5700
Attorneys for Defendants-Respondents Playboy Enterprises, Inc., et al.

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QUESTION PRESENTED FOR REVIEW

In what manner did the 1976 Copyright Act change the definition and application of the "work for hire" doctrine as previously found under the Copyright Act of 1909 and case law arising thereunder?

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EASTER SEAL SOCIETY FOR
CRIPPLED CHILDREN
AND ADULTS OF LOUISIANA, INC.

Plaintiff-Petitioner

versus

PLAYBOY ENTERPRISES, INC., ET AL.

Defendants-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Greater New Orleans Educational Television Foundation ("WYES")[1], Playboy Enterprises, Inc., Playboy Productions, Inc., Playboy Programs, Inc., Playboy Cable Network, Inc., (collectively "Playboy"), Tele-Metropole International, Inc., 120752 Canada, Inc., RSL Films, Ltd., PKO Television, Inc. Rainbow Programming Services, Cox Cable New Orleans, Inc., and Cox Cable of Jefferson, Inc. respectfully submit this Brief in opposition to the Petition for Writ of Certiorari filed herein by Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. ("Society").

—o—

[1]Petitioner's List of All Parties erroneously denominates respondent Greater New Orleans Educational Television Foundation ("WYES") as simply "Television Foundation, Inc." (See page ii, entry number 2, of the petition).

STATEMENT OF THE CASE

WYES, through its unincorporated production division, contracted with Society to produce a videotape of a Mardi Gras style parade and Dixieland jam session to be aired as a segment of the 1982 National Easter Seal Telethon. The contract contained no mention of copyright ownership or transfer. WYES provided the director, production crew, technical equipment and expertise; Society supplied the players. The resulting four and one-half hours of uncut field tape was post-produced by WYES and edited into a sixteen minute master tape which was delivered to Society and broadcast as part of the telethon. WYES retained possession of the field tape, using portions thereof in its local musical programming. Upon request, WYES also made portions of the field tape available to a Canadian broadcast producer for screening. The Canadian producer allegedly incorporated certain portions of the field tape into an audiovisual work which aired on the Playboy Cable Network.

Society protested the airing on Playboy and shortly thereafter filed suit against WYES, Playboy and the other respondents for copyright infringement. Following two years of discovery and several amended petitions, Society filed a Motion for Summary Judgment alleging ownership of the copyright and infringement by Respondents. WYES filed a cross-motion seeking dismissal of Society's motion and recognition of WYES's ownership of the copyright. The United States District Court for the Eastern District of Louisiana determined that WYES was an independent contractor over which Society had exercised insufficient control or supervision to create an employment relationship. Under the "work for hire"

doctrine, therefore, WYES was found to be the copyright owner and Society's Complaint was dismissed. Society appealed the dismissal to the United States Court of Appeals for the Fifth Circuit which affirmed the District Court's dismissal, albeit on different grounds.

The Fifth Circuit held that WYES owned the copyright because under the "literal interpretation" of the work for hire doctrine, as an independent contractor specially commissioned to create a statutorily categorized work, WYES could only divest itself of authorship by written agreement to transfer same. Inasmuch as the contract between WYES and Society contained no such provision, WYES retained copyright authorship and ownership. The Fifth Circuit further held that WYES would be the copyright owner under any interpretation of the work for hire doctrine. Society's application for rehearing was denied per curiam and the instant petition for review was lodged with this Court.

———o———

SUMMARY OF ARGUMENT

The facts of this case lead to the same result under any theory of the work for hire doctrine and a review of the Fifth Circuit's holding would afford Society no relief.

———o———

ARGUMENT

The Facts of this Case Lead to the Same Result under any Theory of "Work For Hire."

Respondents submit that under any theory of "work for hire" as defined by the courts since the Copyright

Act of 1976, 17 U.S.C. § 101, *et seq.*, Society's cause must fail. As the Fifth Circuit stated in its opinion:

> The Easter Seal Society would probably lose on its claim that the field tapes were "works made for hire" under any view of the 1976 Act.

Easter Seal Society v. Playboy Enterprises, Inc., et al., 815 F.2d 323, 336 (5th Cir. 1987); (Petitioner's Appendix, p. 36a).

The Fifth Circuit set forth three possible views of work for hire: the literal interpretation, the conservative interpretation, and, the "Aldon Accessories Compromise," Although the Fifth Circuit decided the case under the literal interpretation, a review of the conservative and Aldon Accessories approaches clearly shows, as the Fifth Circuit intimated, that petitioner cannot recover under any theory.

The conservative theory is as follows:

> If the work was undertaken at the instance and expense of the buyer, and if the buyer had the *right* to control the work, regardless of whether or not the right was exercised, then the seller was a (legal) employee within the meaning of § 101(1). If the buyer wins under traditional analysis, then the court looks to see if the disputed work falls within the nine categories in § 101(2). These categories are accorded special treatment, and the buyer will be the author only if he has complied with the requirement of a written agreement.

Easter Seal Society v. Playboy Enterprises, Inc., et al., 815 F.2d 323, 331 (5th Cir. 1987); (Petitioner's Appendix, pp. 19a-20a).

In the instant case, assuming arguendo that the work, the field tape, was undertaken at the instance and expense

of Society, and that Society had the right to control the work, the work still fails to be a work for hire because there is no written agreement as required by § 101(2) of the 1976 Copyright Act. That section provides that:

> (2) A work specially ordered or commissioned for use as a contribution to a collective work, as part of a *motion picture or other audiovisual work*, . . . [is a work for hire] if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire . . . .

17 U.S.C. § 101(2) (Emphasis added).

In the present case, the field tape was a work specially ordered and commissioned by Society for use as a part of an audiovisual work, the Easter Seal Telethon, and cannot be a work for hire because no written instrument designating it a work for hire was executed.

Society is likewise unable to succeed in its claim for copyright ownership under the Aldon Accessories approach, as enunciated by the Second Circuit in *Aldon Accessories, Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.) *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed. 2d 321 (1984). The Aldon approach focuses on the actual supervision and creative direction exercised by the commissioning party over the creation of the work. Creative direction that is deemed substantial enough entitles the commissioning party to authorship of the work.

In fact, the District Court followed *Aldon* in denying Society's copyright in the field tapes. See *Easter Seal Society v. Playboy Enterprises, Inc., et al.*, Civil Action No. 83-39421; (Petitioner's Appendix, pp. 56a-70a). The District Court found that Society failed to exercise the requisite direction and control over the creation of the

field tapes necessary to render it the statutory author under the *Aldon* view of works for hire. (Petitioner's Appendix, pp. 665a-67a). That finding of fact is echoed in the decision of the Fifth Circuit, although not necessary to its decision. See *Easter Seal Society v. Playboy Enterprises, Inc., et al.,* 815 F.2d 323, 324 (5th Cir. 1987); Petitioner's Appendix, pp. 2a-3a). It is submitted that this "fact," found by both the District Court and Fifth Circuit, may not be upset unless there is a very obvious and exceptional showing of error. *Graver Tank & Manufacturing Company v. Linde Air Products Company,* 69 S.Ct. 535, 538, 336 U.S. 271, 275, 93 L.Ed. 672 (1949); *Tiffany Fine Arts, Inc. v. U.S.,* 105 S.Ct. 725, 730, n.5, 469 U.S. 310, 83 L.Ed. 2d 678 (1985). "In accordance with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals."

The "literal" approach applied by the Fifth Circuit yields the same result. Where a traditional employee-employer relationship under agency law exists, the employer will be the "author" of any work prepared by the creating employee. If the creator is not an employee under traditional agency law, he is an independent contractor, the "author" of his work, and therefore the copyright owner. If the work fits within one of the nine categories enumerated in § 101(2), the independent contractor may designate the work as "for hire" in a written instrument signed by both parties and thus transfer authorship and ownership to the commissioning party. For all other works, the independent contractor, although remaining the author, may transfer copyright ownership under 17 U.S.C. § 204 to the commissioning party, or may grant an exclusive license to the commissioning party.

In the present matter, the Fifth Circuit found that an employee-employer relationship did not exist under agency law between WYES and Society, and therefore that WYES was an independent contractor and author of the field tapes. As no written agreement to designate the work as "for hire" or to transfer the copyright had been made, Society had no claim for infringement by WYES or Playboy.

It is respectfully submitted that a review of this case can result in no relief to Society, and that under any theory of the work for hire provisions of the 1976 Copyright Act, Society is precluded from ownership of the copyright to the audiovisual work.

CONCLUSION

Assuming, for the sake of argument, that there is a split of authority in the circuit courts, this case is not the proper vehicle for resolving any real or perceived differences in the interpretation to be given the work for hire doctrine. As the above makes abundantly clear, Society would not be found the copyright owner under *any* theory.

The Fifth Circuit's opinion is so well-reasoned and thorough as to amount to a virtual treatise on the subject of work for hire. To disturb such a holding on the notion that a different route to the same end may be available would present the classic case of bad facts making bad law. The interpretation and application of the work for hire doctrine is far-reaching. It would be grossly unfair

to independent contractors and commissioning parties alike to base review of such an important determination on facts which do not warrant it. Society's petition for review should be denied.

Respectfully submitted,

OF COUNSEL:

BARHAM & CHURCHILL

CHARLES F. THENSTED
SKYE MCLEOD
400 Lafayette Street, Suite 300
New Orleans, Louisiana 70130
Telephone: (504) 523-3565
Attorneys for Defendant-Respondent Greater New Orleans Educational Television Foundation

Counsel of Record

OF COUNSEL:

CHRISTOVICH & KEARNEY

A.R. CHRISTOVICH, JR.
LIANE C. KING
Pan American Life Center
601 Poydras Street, Suite 2300
New Orleans, Louisiana 70130
Telephone: (504) 561-5700
Attorneys for Defendants-Respondents Playboy Enterprises, Inc., et al.